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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

SHARPER IMAGE CORPORATION,
Petitioner,

v.

DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA,
Respondent.

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida, First District

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PETITION FOR WRIT OF CERTIORARI

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HSPP

QUESTIONS PRESENTED

Under the Due Process Clause of the Fourteenth Amendment, may a state deny any remedy to a taxpayer injured by an unconstitutional and discriminatory tax scheme on the grounds that

(a) state law provides that the invalidation of an unlawful and discriminatory exemption shall not affect taxes assessed against the injured taxpayer, or

(b) the injured taxpayer does not compete in the marketplace with the taxpayers who benefitted from the discriminatory tax exemptions?

RULE 29.6 LISTING

Sharper Image Corporation has no parent companies or nonwholly owned subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Sharper Image Corporation hereby petitions for a writ of certiorari to review the judgment of the District Court of Appeal of Florida, First District, in this case.

OPINIONS BELOW

The order of the Supreme Court of Florida declining discretionary review is set forth in Appendix A. The opinion of the District Court of Appeal of Florida, First District, reported at 704 So. 2d 657 (Fla. Dist. Ct. App. 1997), is set forth in Appendix B. The judgment entered by the Circuit Court in and for Leon County, Florida, is set forth in Appendix C. The order of the Florida District Court of Appeal, denying certification to the Florida Supreme Court, is set forth in Appendix D.

JURISDICTION

The judgment of the District Court of Appeal of Florida, First District, was entered on December 8, 1997. Sharper Image's motion for certification to the Florida Supreme Court was denied by the District Court of Appeal of Florida, First District, on February 16, 1998. Discretionary review was denied by the Florida Supreme Court on September 14, 1998. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following statutes and constitutional provisions, the pertinent portions of which are set forth below:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

> No State shall enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

U.S. Const. amend. XIV, § 1.

> It is hereby declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state, including the business of making mail order sales, or who rents or furnishes any of the things or services taxable under this chapter, or who stores for use or consumption in this state any item or article of tangible personal property as defined herein and who leases or rents such property within the state.

(1) For the exercise of such privilege, a tax is levied on each taxable transaction or incident, which tax is due and payable as follows:

* * * *

(b) At the rate of 6 percent of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed, or stored for use or consumption in this state.

Fla. Stat. Ann. § 212.05(1) (West 1989).

(9) The taxes imposed by this chapter do not apply to the use, sale, or distribution of religious publications, bibles, hymn books, prayer books, vestments, altar paraphernalia, sacramental chalices, and like church service and ceremonial raiments and equipment.

Fla. Stat. Ann. § 212.06(9) (West 1989).

The sale at retail, the rental, the use, the consumption, the distribution, and the storage to be used or consumed in this state of the following are hereby specifically exempt from the tax imposed by part I of this chapter.

* * * *

(w) *Newspapers.*—Likewise exempt are newspapers.

Fla. Stat. Ann. § 212.08(7)(w) (West 1989).

(2) It is hereby declared to be the specific legislative intent to tax each and every sale, admission, use, storage, consumption, or rental levied and set forth in this chapter, except as to such sale, admission, use, storage, consumption, or rental as shall be specifically exempted therefrom by this chapter subject to the conditions appertaining to such exemption. It is further declared to be the specific legislative intent that should any exemption or attempted exemption from the tax or the operation or imposition of the tax or taxes be declared to be invalid, ineffective, inapplicable, unconstitutional, or void for any reason, such declaration shall not affect the tax or taxes imposed herein, but such sale, admission,

> use, storage, consumption, or rental, or any of them exempted or attempted to be exempted from the tax or taxes or the operation or the imposition of the tax or taxes, shall be subject to the tax or taxes and the operation and imposition thereof to the same extent as if such exemption or attempted exemption had never been included herein.

Fla. Stat. Ann. § 212.21(2) (West 1989).

STATEMENT OF THE CASE

This case presents two direct conflicts between the decisions of this Court and the decision of a Florida appellate court (which the Florida Supreme Court refused to review). The court below held that Sharper Image was not entitled to a remedy from a tax scheme whose special exemption for newspapers is admittedly unconstitutional (*Department of Revenue v. Magazine Publishers of Am., Inc.*, 604 So. 2d 459 (Fla. 1992)), and whose exemption for religious publications is unconstitutional under the decisions of this Court (*Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989)), as the First District Court of Appeal conceded. The Florida court denied Sharper Image any relief on the grounds that

(1) a Florida statute permits the state to collect and retain the discriminatory tax, even if the exemptions that create the discrimination are illegal, and

(2) Sharper Image was not competitively harmed by the unconstitutional deprivation because its catalogs did not compete directly in the marketplace with newspapers and religious publications, which are exempted from the use tax by statute.

Both of these holdings override the requirements of due process of law and squarely conflict with this Court's decisions. This is not the first time the Florida courts have disregarded this Court's precedents nor, given the state of Florida's law, will it be the last, unless certiorari is granted and the judgment below reversed. Florida's law challenged here is by no means unique. Other states

have similar tax laws. A decision here, therefore, will establish a uniform rule for controlling the assessment and collection of tens, perhaps hundreds, of millions of tax dollars.

A. Statement of Facts

Sharper Image is a Delaware corporation with its headquarters in San Francisco. The company sells its products through mailed catalogs as well as in its own retail stores, seven of them in Florida. Petitioner collected and remitted to the Department all Florida sales and use taxes due on sales at its Florida stores and on mail order sales to Florida residents. Petitioner challenges only the use taxes assessed on its monthly catalogs, which were printed and mailed from Nebraska by a contractor of Sharper Image's selection and which were delivered by the United States Postal Service.

The Department of Revenue assessed use taxes on the distribution of the catalogs in the amount of $212,170.22 for the audit period of April 1, 1987, through March 31, 1990. The tax was calculated at five percent (increased to six percent effective February 1, 1988) of the cost price of the catalogs. When the Department refused to abate the assessed taxes, Sharper Image sought a predeprivation remedy by filing suit in a Florida Circuit Court.[1] Sharper Image challenged the taxes assessed on the ground that the assessment violated the First Amendment, made applicable to the states by the Fourteenth Amendment's Due Process Clause, the Fourteenth Amend-

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[1] Sharper Image filed the lawsuit pursuant to Fla. Stat. ch. 72.011 (1)(a) (Supp. 1994), which allows a taxpayer to challenge the legality of a tax before payment. *See* App. 19a. Section 72.011 (3)(b)(1) generally requires the challenging party to deposit into the court the amount of the challenged assesment, plus penalties and accrued interest. That section does, however, allow the Department to waive the requirement that the amount of the challenged assessment be tendered into court. Sharper Image obtained such a waiver.

ment's Due Process Clause itself, and the Equal Protection Clause of the Fourteenth Amendment.[2]

Sharper Image's equal protection and due process claims rested on the undisputed unconstitutionality of Florida's use tax regime. In particular, Sharper Image contended that the exemptions for newspapers and religious publications rendered Florida's use tax regime unconstitutionally discriminatory. Sharper Image contended that the Department could either: (a) assess use taxes against those improperly exempted from the tax during the audit period, or (b) abate the use taxes assessed against Sharper Image for that same period.

B. Proceedings Below

The parties cross-moved for summary judgment in the Circuit Court. On August 27, 1996, the Circuit Court granted the Department's motion and denied Sharper Image's motion. Sharper Image then filed a timely appeal in the Florida District Court of Appeal, First District. That court affirmed the Circuit Court's decision.

The District Court of Appeal acknowledged that the Florida Supreme Court had struck down the newspaper exemption in *Department of Revenue v. Magazine Publishers of Am., Inc.*, 604 So. 2d 459 (Fla. 1992). The District Court of Appeal further acknowledged that the religious publications exemption is apparently unconstitutional under this Court's decision in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989). The court found it unnecessary to declare the religious publications exemption unconstitutional, however, on the grounds that "Sharper Image [did] not suggest that its requested remedy would take a different form depending on which exemption is involved." *See* App. 11a.

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[2] Sharper Image also alleged that it had exercised no taxable privilege in Florida, that various aspects of Florida's tax scheme violated the Commerce Clause, and that other aspects of the assessment violated Florida law. These claims are not presented here.

Despite the conceded unconstitutionality of Florida's use tax regime as applied to publications, the District Court of Appeal rejected Sharper Image's equal protection and due process claims. *See* App. 11-15a. The District Court of Appeal looked to state law to provide the appropriate remedy for an unconstitutional exemption. *See* App. 13a. That Florida law states that, when a tax exemption is struck down, "such declaration shall not affect the tax or taxes imposed herein." Fla. Stat. Ann. § 212.21(2) (West 1989). In addition, the District Court of Appeal noted that, unlike in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), the unlawful exemptions in this case did not give religious publications and newspapers a "competitive advantage" over Sharper Image. *See* App. 15a. Therefore, the District Court of Appeal held that, although the newspaper exemption was no longer valid, the tax imposed on Sharper Image during the audit period was a "legal tax that did not competitively disadvantage the taxpayer." App. 16a.[3]

Sharper Image sought review of the District Court of Appeal's decision in the Florida Supreme Court. The Department opposed Sharper Image's petition for review on the grounds that, *inter alia*, Sharper Image had not

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[3] The District Court of Appeal rejected the Department's contention that, despite the unconstitutionality of the exemptions, Sharper Image had no standing to challenge them. *See* App. 10a (citing *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 227 (1987) (holding that the publisher of a general interest magazine had standing to challenge tax exemptions for newspapers and religious publications), and *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 7-8 (1989) (holding that publisher of a nonreligious magazine could challenge a tax exemption for religious periodicals)). Because that court found standing and decided the federal questions asserted by Sharper Image, this Court has no occasion to revisit that finding. *See Coleman v. Miller*, 307 U.S. 433, 446 (1939) (holding that where the asserted interests are "treated by the state court as a basis for entertaining and deciding the federal questions," that "is sufficient to give the Court jurisdiction to review that decision").

"challenged the validity of the First District Court of Appeal's decision on the merits of the case," Respondent's Brief on Jurisdiction, Fla. S. Ct., at 3; that "the District Court did not find any discrimination between the use tax on the catalogs and either the newspaper or religious publication exemptions contained in the Florida Statutes," *id.* at 4; that Sharper Image had "not presented to this Court *any* argument in opposition to or in explanation of why the District Court's decision on the tax assessment is incorrect," *id.*; and that "[r]emedy was not an issue below," *id.* at 6. These were complete mischaracterizations of Sharper Image's petition.[4] On September 14, 1998, the Florida Supreme Court denied Sharper Image's petition for review. *See* App. 1a.

REASONS FOR GRANTING THE WRIT

This Court has long sought to ensure that states provide clear and certain remedies to taxpayers subjected to unlawful and discriminatory taxation. Here, even though Florida has assessed and will collect taxes from Sharper

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[4] First, Sharper Image's entire brief to the Florida Supreme Court "challenged the validity of the First District Court of Appeal's decision on the merits of the case." *See, e.g.*, Petitioner's Brief on Jurisdiction, Fla. S. Ct., at 3-10 (challenging the District Court of Appeal's holding that severance of discriminatory exemption was sufficient and that Sharper Image was not entitled to retroactive relief). Second, the District Court of Appeal clearly acknowledged that the newspaper exemption is unconstitutional discriminatory taxation, *see* App. 10a, and apparently assumed, without deciding, that the religious publications exemption is also unconstitutional, *see* App. 11a. Finally, the remedy required by the Due Process Clause was the very heart of Sharper Image's case. *See* Complaint ¶ 42 (alleging that Florida's severance of the unlawful exemption would "provide an insufficient remedy to the Plaintiff" and would "fail[] to provide meaningful backward looking relief"); Initial Brief of Sharper Image, Fla. Dist. Ct. App., at 9 (alleging that Florida had provided no "meaningful retrospective relief to cure" the unconstiutional discrimination); Petitioner's Brief on Jurisdiction, Fla. S. Ct., at 5 (challenging the District Court of Appeal's "failure to fashion any type of retroactive remedy").

Image under an admittedly unconstitutionally discriminatory tax scheme, Florida has denied Sharper Image any retroactive relief for taxes already assessed as well as any prospective relief from future discriminatory taxes. In so doing, the Florida courts flout past decisions of this Court requiring that victims of unconstitutionally discriminatory taxation be afforded a clear, certain, and meaningful remedy.

This case is an extreme but all-too-common example of states refusing to provide the remedies required by the Fourteenth Amendment.

1. Florida's rule renders inoperative this Court's efforts to ensure that victims of discriminatory taxation are given meaningful remedies. The Florida District Court of Appeal mischaracterizes *McKesson* as allowing a state to assess and collect unconstitutionally discriminatory taxes so long as a state statute authorizes that procedure. This is plainly wrong; state statutes may not override the requirements of the Fourteenth Amendment's Due Process Clause simply because the state prefers to keep the taxes already assessed and collected and to continue taxing unconstitutionally. This Court's decisions make clear that although remedies for discriminatory taxation are determined by state law, such remedies must meet minimum requirements of due process. Among those requirements is the obligation of a state to "create in hindsight a nondiscriminatory scheme," *McKesson*, 496 U.S. at 40, and to cease discriminating in the future.

2. The District Court of Appeal misinterprets *McKesson* and drastically narrows other decisions of this Court by ruling that a state must remedy unlawfully discriminatory taxation only where the injured taxpayer suffers a "competitive disadvantage." *Reich v. Collins*, 513 U.S. 106 (1994), *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993), *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989), and *Texas Monthly*,

Inc. v. Bullock, 489 U.S. 1 (1989), are squarely to the contrary.

3. Absurd as Florida's position is, the decision below is not an isolated incident. Just last term, this Court ruled for taxpayers from whom Florida had collected taxes subsequently declared unlawful based on the same newspaper exemption at issue here. *See Newsweek, Inc. v. Florida Dep't of Revenue*, 118 S. Ct. 904 (1998) (reversing a decision by the Florida District Court of Appeal denying a post-deprivation remedy to taxpayers injured by the unconstitutional newspaper exemption). The Court also vacated a similar decision by the Florida Supreme Court for reconsideration in light of *Newsweek*. *See Dryden v. Madison County*, 696 So. 2d 728 (Fla. 1997), *vacated*, 118 S. Ct. 1162 (1998).

Indeed, it was the actions of the Florida Department of Revenue that gave rise to *McKesson*. In that case, the Court ruled for Florida taxpayers who sought a refund of excessive taxes paid pursuant to a tax scheme that violated the Commerce Clause. Although the Florida Supreme Court in that case acknowledged that the tax at issue violated the Commerce Clause, it nonetheless erroneously "declined to order any other form of relief for the taxes previously paid and timely challenged under the discriminatory scheme." 496 U.S. at 25.

In short, Florida's Department of Revenue and the Florida courts continue to disregard the requirements of the Due Process Clause with respect to remedying unlawful and discriminatory taxation. Moreover, Florida continues to exempt religious publications from its use tax, thereby continuing unlawful discrimination and ensuring future constitutional challenges to taxes assessed and/or collected by Florida under this regime. Certiorari should be granted to address a situation that is certain to recur.

Although perhaps the worst offender, Florida is not alone. Other state courts also allow states to evade their obligation to remedy discriminatory taxes. See *infra* pp.

16-18. In addition, at least thirteen other states have statutes similar to the one on which Florida relied in denying Sharper Image any remedy. *See infra* p. 18.

CERTIORARI SHOULD BE GRANTED TO PROTECT TAXPAYERS FROM UNCONSTITUTIONAL AND DISCRIMINATORY TAXATION

Despite this Court's repeated efforts to ensure that states relieve taxpayers of injuries caused by unlawful discriminatory taxation, the Florida courts denied Sharper Image a remedy on transparently fallacious reasoning. The District Court of Appeal held that, so long as a state statute required retention of an unlawfully collected tax, the state need not abate the tax here. Nor did the District Court of Appeal cure the discrimination because the religious publication exemption, although declared unconstitutional by the United States Supreme Court, had not yet been invalidated by the Florida Supreme Court. The District Court of Appeal also sought to distinguish controlling authority holding that taxpayers are entitled to relief from unconstitutionally discriminatory taxes even if they do not compete with the beneficiaries of the unconstitutional exemptions. None of these arguments provides a legitimate basis for what Florida has done and continues to do to petitioner.

As this Court's decisions in *Newsweek*, *Dryden*, and *McKesson* indicate, this Court has acted time and again to ensure that states comply with the requirements of due process. Unfortunately, this Court's intervention is necessary again to settle the matter once and for all.

A. Florida Denies Due Process of Law By Collecting, and Retaining, Taxes Imposed Upon Disfavored Taxpayers While Unconstitutional Exemptions Are In Effect.

The District Court of Appeal justified its refusal to provide a remedy on the grounds that a Florida statute provides that the unconstitutionality of a tax exemption "shall

not affect the taxes imposed." App. 14a. Specifically, Florida law provides:

> (2) It is hereby declared to be the specific legislative intent to tax each and every . . . use . . . set forth in this chapter . . . [and] should any exemption or attempted exemption from the tax . . . be invalid, ineffective, inapplicable, unconstitutional, or void for any reason, such declaration shall not affect the tax or taxes imposed herein, but such . . . use . . . exempted from the tax . . . shall be subject to the tax . . . to the same extent as if such exemption or attempted exemption had never been included herein.

Fla. Stat. Ann. § 212.21(2) (West 1989). Florida has not collected taxes from the exempted publications for the period for which it has assessed the use tax against petitioner.[5] Thus, the statute and the court's decision directly contradict this Court's long-established position that a person "who denies the legality of a tax should have a clear and certain remedy." *Atchison, T. & S.F. Ry. Co. v. O'Connor*, 223 U.S. 280, 285 (1912). For example, in *Ward v. Board of County Comm'rs*, 253 U.S. 17 (1920), the Court ordered Oklahoma to refund taxes collected from American Indians in violation of federal law, but which the state courts refused to remedy. This Court held that

> [t]o say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these Indian allottees arbitrarily and without due process of law.

Id. at 24; *see also Carpenter v. Shaw*, 280 U.S. 363, 369 (1930) (reversing refusal to provide a remedy for unlaw-

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[5] Indeed, Florida concedes that it has not identified, and cannot identify, the taxpayers who took advantage of the newspaper and religious publication exemptions during the audit period. *See* Initial Brief of Sharper Image, Fla. Dist. Ct. App., at 18-19 (collecting record citations).

ful taxes collected from Native Americans in violation of federal law on the grounds "that a denial by a state court of a recovery of taxes exacted in violation of the laws or the Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment").

In *Montana Nat'l Bank v. Yellowstone County, Mont.*, 276 U.S. 499 (1928), the Court reversed a decision refusing to remedy unlawful taxes levied by Montana against the shareholders of certain banks. Montana declined to provide a remedy on the grounds that the taxes were no longer being assessed in an unlawful manner. This Court held that, notwithstanding the state's repudiation of the unlawful tax scheme, the state was required to "cure the mischief which had been done." *See id.* at 504.

Similarly, *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239 (1931), required Iowa to provide a remedy to out-of-state banks that had been subjected to unlawfully discriminatory taxes. The Iowa Supreme Court acknowledged the discrimination, but held that the only remedy the petitioners were entitled to was "to await action by the taxing authorities to collect the taxes remaining due from their competitors or to initiate proceedings themselves to compel such collection." *Id.* at 243-44. This Court disagreed: "The right invoked is that to equal treatment," the Court stated, "and such treatment will be attained if either their competitors' taxes are increased or their own reduced." *Id.* at 247.

In *McKesson*, the Court reversed a Florida Supreme Court decision refusing to remedy a Florida tax on out-of-state crops that violated the Commerce Clause. *See* 496 U.S. at 24-25. Although the Florida Supreme Court struck down the tax and enjoined the state from preferring in-state goods in the future, it refused to provide the petitioner with a refund of taxes it had already paid. This Court held that

> [b]ecause exaction of a tax constitutes a deprivation of property, the State must provide procedural safeguards against unlawful exactions in order to satisfy the commands of the Due Process Clause. The State may choose to provide a form of 'predeprivation process,' for example, by authorizing taxpayers to bring suit to enjoin imposition of a tax prior to its payment, or by allowing taxpayers to withhold payment and then interpose their objections as defenses in a tax enforcement proceeding initiated by the State.

Id. at 36-37 (footnotes omitted). In any event, the state is required to "provide meaningful backward-looking relief to rectify any unconstitutional deprivation." *Id.* at 31.

McKesson gave the states some flexibility in crafting this remedy. *See id.* at 39-43, 51-52. The Court held that a state may cure discriminatory taxation by "refunding to petitioner the difference between the tax it paid and the tax it would have been assessed were it extended the same rate reductions that its competitors actually received." *Id.* at 40. Alternatively, the state may "assess and collect back taxes from petitioner's competitors who benefitted from the rate reductions during the contested tax period, calibrating the retroactive assessment to create in hindsight a nondiscriminatory scheme." *Id.*[6] Either way, the

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[6] Although the Court spoke in terms of competitors in *McKesson*, as discussed in Part B., *infra*, pp. 15-16, that challenge had been brought under the Commerce Clause by competitors of those who benefitted from the unconstitutional exemptions. Competition was relevant to show discrimination against interstate commerce. This Court's decisions in *Reich*, *Harper*, *Davis*, and *Texas Monthly* establish that remedies for unconstitutional taxation are not limited to those who compete with the beneficiaries of the unlawful exemption. *See Reich*, 513 U.S. at 108 (no showing of competitive disadvantage necessary in order to remedy discriminatory taxation based on intergovernmental tax immunity); *Harper*, 509 U.S. at 100-102 (same); *Davis*, 489 U.S. at 817-18 (same); *Texas Monthly*, 489 U.S. at 8 (no showing of competitive disadvantage necessary in order to remedy discriminatory taxation under Establishment Clause of the First Amendment).

purpose of the retroactive relief is to "bring about the nondiscrimination that prompt injunctive relief would have achieved." *Id.* at 43 (internal quotation marks omitted). Florida ignored *McKesson* by providing neither alternative.

Moreover, Florida continues to exempt religious publications from its use tax, thereby ensuring that the issues presented in this case will recur. Taxpayers who challenge this discriminatory taxation in the future will be confronted with the same statutory bar to due process faced by the petitioner here.

B. Florida Denies Due Process Of Law By Refusing Sharper Image a Remedy Because Sharper Image Does Not Compete In the Marketplace With Those Who Benefitted From the Unlawful Exemptions.

The District Court of Appeal also refused to provide Sharper Image a remedy on the grounds that Sharper Image catalogs do not compete with religious publications and newspapers. See App. 15a. This conclusion overlooks that the discrimination at issue here is banned by the First Amendment's prohibition of laws abridging the freedom of speech or respecting an establishment of religion. Competitive disadvantage is not a prerequisite to a remedy where a state has discriminated against a taxpayer because of the content of its publication, as is the case here.

The *McKesson* Court discussed competitive disadvantage because the challenge in that case was brought under the Commerce Clause by out-of-state competitors of the in-state firms that had benefitted from discriminatory tax exemptions. The exemptions were illegal only because their effect on competition produced discrimination against interstate commerce. The purpose of remedying the discriminatory taxation was to protect the injured taxpayer "from the comparative economic disadvantage proscribed by the Commerce Clause." *McKesson*, 496 U.S. at 20.

Outside the context of the Commerce Clause, the Court has not required a showing of competitive disadvantage in discriminatory tax cases. *See Reich*, 513 U.S. at 108 (no showing of competitive disadvantage necessary in order to remedy discriminatory taxation based on intergovernmental tax immunity); *Harper*, 509 U.S. at 100-102 (same); *Davis*, 489 U.S. at 817-18 (same); *Texas Monthly*, 489 U.S. at 8 (no showing of competitive disadvantage necessary in order to remedy discriminatory taxation under Establishment Clause of the First Amendment). As demonstrated by the District Court of Appeal's determination that Sharper Image has standing to challenge the discriminatory exemptions, *see* App. 10a, competitive disadvantage is completely irrelevant to the discrimination suffered by Sharper Image.[7]

C. Despite This Court's Decisions, Other States Continue to Deny Due Process of Law to Taxpayers Subjected to Unconstitutionally Discriminatory Taxation.

Unfortunately, the decision below is by no means an isolated incident. Florida, however, has been the most recalcitrant in providing a remedy to taxpayers subjected to an unconstitutionally discriminatory tax regime. Just last term, for example, in *Newsweek, Inc. v. Florida Dep't of Revenue*, 118 S. Ct. 904 (1998), the Court prevented Florida from using a "bait and switch" tactic—disallowing a postdeprivation remedy on the grounds that a predeprivation remedy had been available—to retain sales taxes collected during the time the unlawful newspaper exemption at issue in this case was still in effect.

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[7] The District Court of Appeal also erred in attempting to distinguish this case from the *McKesson* line of cases on the grounds that Sharper Image, unlike the taxpayer in *McKesson*, "challenges the exemptions, and not the tax itself." App. 15a. The taxpayer in *McKesson* challenged its tax because of the exemption. The same was true in *Department of Revenue v. Kuhnlein*, 646 So. 2d 717 (Fla. 1994). Just as the taxpayers in *McKesson* and *Kuhnlein*, Sharper Image challenges the validity of the taxes assessed against it on the basis of the unlawful exemptions.

Last term this Court also vacated another decision of the Florida Supreme Court refusing to remedy discriminatory taxation. In *Dryden v. Madison County*, 696 So. 2d 728 (Fla. 1997), *vacated*, 118 S. Ct. 1162 (1998), a trial court awarded only a partial refund to the taxpayers who successfully challenged special assessments imposed by a county on their property. Reviewing the trial court's decision, the Florida Supreme Court held that, despite *McKesson*, in some circumstances a state need not refund the proceeds of an illegal tax: "[w]here an invalid tax scheme applies across the board . . . 'equitable considerations' may preclude a refund." *Id.* at 730. The court found such equitable considerations in the fact that the taxes were used to provide benefits to all property owners, including garbage collection and disposal, landfill closure, ambulance services, and fire protection. *See id.* In addition, the Florida court noted that the county had "acted in good faith in imposing these assessments." *Id.* This Court vacated the Florida Supreme Court's decision in *Dryden* last term for further consideration in light of *Newsweek*.[8]

Although Florida is probably the most obstinate in refusing to afford taxpayers a remedy for discriminatory taxation, Florida is not alone. For example, in *Thayer v. South Carolina Tax Comm'n*, 413 S.E.2d 810 (S.C. 1992), the South Carolina Supreme Court held that a taxpayer who had successfully challenged an unconstitutional exemption was entitled only to severance of the unlawful exemption. *See id.* at 815. The court held that *McKesson* is applicable "only when taxpayers involuntarily pay a tax that is unconstitutional under *existing* precedents. *McKesson* is inapplicable when, as here, taxpayers have been subjected to a constitutional tax." *Id.* (emphasis added). The tax was "constitutional," accord-

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[8] The Florida Supreme Court has not yet issued its decision on remand.

ing to the South Carolina court, only because its clear unconstitutionality had not been recognized when it was collected.

More recently, in *H.J. Wilson Co. v. State Tax Comm'n*, No. 97-CA-00121-SCT, 1998 WL 427261 (Miss. July 30, 1998), the Mississippi Supreme Court, despite striking down a tax exemption as unconstitutional, refused to award a refund to a retail company that distributed product catalogs in the state on the grounds that the tax itself, apart from the exemption, was a "constitutional tax." *Id.* at *20.

Aside from these reported state court decisions, at least thirteen states, including South Carolina and Mississippi, have enacted statutes similar to Florida's. *See* Cal. Gov't Code § 55821 (West 1997); Del. Code Ann. tit. 5, § 1110 (1997); 35 Ill. Comp. Stat. Ann. 105/18-18 (West 1996); Kansas Stat. Ann. § 79-2011 (1997); Minn. Stat. Ann. § 168.76 (West 1986); Miss. Code Ann. § 27-10-23 (Supp. 1998); N.J. Stat. Ann. § 54:32B-29 (West 1986); N.Y. Real Prop. Tax Law § 1172 (McKinney 1989); R.I. Gen. Laws § 44-7-21 (1997); S.C. Code Ann. § 4-12-50 (Law Co-op. 1997); S.D. Codified Laws § 10-52-6 (Michie 1998); Wash. Rev. Code Ann. § 82.18.900 (West 1997); W. Va. Code § 11-21-94 (1998). Certiorari is therefore warranted to ensure that these state laws comport with due process.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 11, 1998

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APPENDICES

APPENDIX A

SUPREME COURT OF FLORIDA

Monday, September 14, 1998

Case No. 92,604

District Court of Appeal
1st District—No. 96-3734

SHARPER IMAGE CORPORATION,
Petitioner,

v.

FLORIDA DEPARTMENT OF REVENUE,
Respondent.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petiton for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

HARDING, C.J. and OVERTON, ANSTEAD and PARIENTE, JJ., concur.

WELLS, J., dissent.

A True Copy

TEST

/s/ Sid J. White
SID J. WHITE
Clerk, Supreme Court

APPENDIX B

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

Case No. 96-3734

SHARPER IMAGE CORPORATION,
Appellant,

v.

DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA,
Appellee.

Opinion filed December 8, 1997.

An appeal from the Circuit Court of Leon County, William Gary, Judge.

KAHN, J.

This case involves a tax assessment against appellant, Sharper Image Corporation (Sharper Image), by the Department of Revenue (Department). In 1994, Sharper Image filed suit in circuit court, challenging the Department's assessment of use tax on catalogs published by Sharper Image outside of Florida and sent by Sharper Image's printer directly to Florida residents during the audit period of April 1, 1987, through March 31, 1990. Sharper Image and the Department filed cross-motions for summary judgment. The circuit court granted the Department's motion and denied Sharper Image's motion, entering final summary judgment in the Department's favor. Sharper Image has appealed and raises essentially two points: (1) Sharper Image exercised no taxable privilege with respect to the catalogs in Florida as required by the Florida statute, and (2) the assesment of use taxes on

Sharper Image catalogs violates the First Amendment and the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution because the newspaper exemption of section 212.08(7)(w), as applied by the Department, violates the First Amendment, and the religious publication exemption of section 212.06(9) violates the First Amendment.[1] Sharper Image seeks abatement of use taxes assessed against it. We hold that the Department properly assessed a use tax, and that, irrespective of the illegality of the exemptions, Sharper Image is not entitled to the remedy it seeks.

In this case, no dispute exists regarding the facts. Sharper Image is a Delaware corporation headquartered in San Francisco. The company makes retail sales of merchandise through both mail and telephone order, and in store sales. During the audit period, Sharper Image maintained seven retail stores in Florida. It collected and remitted to the Department all Florida sales and use taxes due on sales at the Florida stores and on mail order sales to Florida residents.

The challenged use taxes were assessed on Sharper Image's monthly catalog. The catalog was printed and mailed from Nebraska by a contractor selected by Sharper Image. The catalogs were delivered by the United States Postal Service to residents of Florida and other states. Sharper Image stipulated that it intentionally, purposefully, and with the object to increase sales in Florida, distributed or caused to be distributed, the catalogs.

I. Exercise of a Taxable Privilege

First, appellant asserts that Sharper Image exercised no taxable privilege in Florida with respect to the catalogs. According to appellant, the circuit court ignored the re-

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[1] The parties filed a stipulation indicating that Service Merchandise Company (Service Merchandise) could file a brief as amicus curiae in support of appellant Sharper Image, and this court has approved that stipulation.

quirement under Florida law that a use or distribution of tangible personal property must occur "in this state" to properly trigger the use tax. Further, in arguing that no taxable event has occurred in this case, amicus Service Merchandise asserts that language in section 212.06(1)(a)[2] and section 212.06(6)[3] "make[s] plain the Legislature's design only to tax transactions or activities which occur after the arrival of the property in Florida and its repose here as part of the mass of property." Neither contention will withstand scrutiny.

> Section 212.05(1)(b), Florida Statutes (1987), provides: [A] tax is levied on each taxable transaction or incident, which tax is due and payable as follows: . . .
>
> (b) At the rate of 5 percent of the cost price of each item or article of tangible personal property when the same is not sold but used, consumed, *distributed,* or stored for use or consumption *in this state.*

(emphasis added).[4] Further, section 212.06(1)(a), Florida Statutes (1987), provides:

> The aforesaid tax at the rate of 5 percent of the retail sales price as of the moment of sale, 5 percent of the cost price as of the moment of purchase, or *5 percent of the cost price as of the moment of commingling with the general mass of property in this*

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[2] Section 212.06(1)(a), Florida Statutes (1987), is quoted *infra.*

[3] Section 212.06(6), Florida Statutes (1987), provides:

> It is however, the intention of this chapter to levy a tax on the sale at retail, the use, the consumption, the distribution, and the storage to be used or consumed in this state of tangible personal property after it has come to rest in this state and has become a part of the mass property of this state.

[4] The tax rate in section 212.05(1)(b) was increased to 6 percent effective February 1, 1988. Ch. 87-548, § 8, at 39-40, Laws of Fla.

> *state*, as the case may be, shall be collectible from all dealers as herein defined on the sale at retail, the use, the consumption, the *distribution*, and the storage for use or consumption *in this state* of tangible personal property or services taxable under this part.
> . . .

(emphasis added).[5] In our view, the collective import of these statutes is that if tangible personal property is *distributed in Florida*, it is subject to a use tax. Because Sharper Image distributed tangible personal property, i.e., its catalogs, in Florida, it exercised a taxable privilege in this state and must pay a use tax. The "mass of property" and "moment of commingling" language in sections 212.06 (1)(a) and 212.06(6) refers only to valuation of property taxed under the statute and does not impose an additional prerequisite to taxation itself.

Sharper Image also asserts that "for the mailing of promotional materials from outside Florida directly to Florida residents to be a taxable event, a company must engage in activities regarding the production, printing, or mailing of the promotional materials *in Florida*" and "[t]hat simply did not occur here." The Connecticut Supreme Court has recently rejected a similar argument made by Sharper Image in contesting a use tax assessment on the distribution of its catalogs in that state: "Although Sharper Image neither stored, accepted or consumed the catalogs in this state, it did cause them to be distributed in Connecticut, which satisfies the broad taxable event of 'other use'. . . ." *Sharper Image Corp. v. Miller*, 692 A.2d 774, 779 (Conn. 1997). The Connecticut use tax statute, unlike the Florida statute, does not include the word "distribution." Nevertheless, the Connecticut Supreme Court determined that distribution fell within the plain language of "other use," a term included in the statute. *See also Service Merchandise Co. v. Arizona Dep't of Rev.*, 937 P.2d 336 (Ariz. Ct. App. 1996) (upholding use tax

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[5] The tax rate in section 212.06(1)(a) was increased to 6 percent effective February 1, 1988. Ch. 87-548, § 21, at 58-59, Laws of Fla.

assessment because distribution of catalogs and fliers in Arizona was use incidental to ownership even though "distribution" not specifically included in statute); *cf. Sharper Image Corp. v. Department of Treasury,* 550 N.W.2d 596 (Mich. Ct. App. 1996) (finding no use tax due where use tax statute did not specifically provide for taxation of distributions), *appeal denied,* 560 N.W.2d 636 (Mich. 1997).

In this case, not only does the Florida use tax statute specifically refer to distribution, but it also contains a definition of "use tax": "The term 'use tax' referred to in this chapter includes the use, the consumption, the distribution, and the storage as herein defined." § 212.02 (28), Fla. Stat. (1987). Further, the Florida statute defines "use":

> "Use" means and includes the exercise of any right or power over tangible personal property incident to the ownership thereof, or interest therein, except that it does not include the sale at retail of that property in the regular course of business. "Use" also means the consumption or enjoyment of the benefit of services.

§ 212.07(27), Fla. Stat. (1987). In addition, the definition section of the statute contains the following provision:

> The terms "retail sales," "sales at retail," *"use,"* "storage," and "consumption" include the sale, use, storage, or consumption of *all tangible advertising materials imported or caused to be imported into this state.* Tangible advertising material includes displays, display containers, brochures, *catalogs,* price lists, point-of-sale advertising, and technical manuals or any tangible personal property which does not accompany the product to the ultimate consumer.

§ 212.02(19)(b), Fla. Stat. (1987) (emphasis added). These statutes defining "use tax" and "use," particularly

section 212.02(19)(b), evidence the Legislature's intent to tax the distribution of catalogs in Florida, the activity at issue here.

Although Sharper Image made all of the arrangements concerning the mailing of the catalogs from its California headquarters, Sharper Image nevertheless supplied the addresses for the catalogs and directed that those catalogs be placed in the United States mail. *See Sharper Image Corp. v. Miller,* 678 A.2d 977, 980 (Conn. App. Ct. 1996) ("The plaintiff's control was the direction; relinquishing the right to withdraw or redirect does not for purposes of 'ownership' relinquish control. . . . By directing the shipping of the catalogs, Sharper Image retained ownership, even though it relinquished physical possession to the postal service."), *aff'd,* 692 A.2d 774 (Conn. 1997); *Talbots, Inc. v. Schwartzberg,* 928 P.2d 822 (Colo. App. Ct. 1996) (holding that distribution of catalogs to city addresses constituted use within city subject to taxation under municipal code provision). Sharper Image thus caused its catalogs to be distributed in Florida. Indeed, in the Connecticut case, Sharper Image may have conceded that its actions regarding the catalogs constituted "distribution" in that state. *See Miller,* 692 A.2d at 778 ("The crux of Sharper Image's argument is that, under the circumstances of this case, *the distribution of its catalogs in Connecticut* did not meet the definition of 'use' . . . ." (emphasis added)); *Miller,* 678 A.2d at 980 ("Sharper Image also argues that this statutory definition of 'use' cannot be judicially extended to include 'distribution.' "). Accordingly, in this case, the circuit court properly upheld the use tax assessment against Sharper Image because it distributed its catalogs in this state.

II. Constitutional Challenges to Exemptions

In the second point on appeal, appellant asserts that the assessment of use taxes on Sharper Image catalogs violates the First Amendment and the Due Process Clause of

the Fourteenth Amendment to the U.S. Constitution because the newspaper exemption of section 212.08(7)(w)[6] violates the First Amendment, and the religious publication exemption of section 212.06(9)[7] violates the First Amendment. Specifically, appellant argues that because the newspaper exemption and the religious publication exemption are unconstitutional, the use tax assessed against Sharper Image cannot be upheld. In response, appellee asserts that Sharper Image does not have standing to raise such an argument. To the point, appellee contends that Sharper Image is not in competition with newspapers or religious publications and, therefore, Sharper Image has not suffered any injury by having assessed against it a use tax on the distribution of its catalogs even though newspapers and religious publications are exempt from such tax.

In support of its contention that Sharper Image lacks standing, appellee relies on *Eastern Airlines, Inc. v. Department of Revenue*, 455 So. 2d 311 (Fla. 1984). In *Eastern Air Lines*, an airline that had been assessed a sales tax on aviation jet fuel attempted to challenge, as unconstitutional under the Commerce Clause, provisions granting fuel tax refunds to farmers and commercial fishermen. 455 So. 2d at 316. The Department asserted that the airline did not have standing to challenge these provisions because the airline was not in the fishing or farming business and the airline had not argued that farmers and/or fishermen are in direct or indirect competition with

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[6] Section 212.08(7)(w), Florida Statutes (Supp. 1988), provides:

(7) MISCELLANEOUS EXEMPTIONS.—

(w) *Newspapers.*—Likewise exempt are newspapers.

[7] Section 212.06(9), Florida Statutes (1987), provides:

The taxes imposed by this chapter do not apply to the use, sale, or distribution of religious publications, bibles, hymn books, prayer books, vestments, alter paraphernalia, sacramental chalices, and like church service and ceremonial raiments and equipment.

fishing or agriculture. *Id.* at 317. The Florida Supreme Court agreed that the airline did not have standing to raise the unconstitutionality of the refund provisions. *Id.; see State ex rel. Clarkson v. Philips,* 70 So. 367, 369 (Fla. 1915) ("One cannot raise an objection to the constitutionality of a part of a statute, unless his rights are in some way injuriously affected thereby, or unless the unconstitutional feature renders the entire act void or renders the portion complained of inoperative. . . . The constitutionality of a provision of a statute cannot be tested by a party whose rights or duties are not affected by it, unless the provision is of such a nature that it renders invalid a provision of the statute that does affect the party's right or duties."). The court explained that, even if it eliminated the refund provisions, the airline's rights would not be affected:

> We believe that the legislature's intent could still be accomplished if the full refund provisions relating to local commercial fishing and agriculture were to be eliminated and the remainder of the statute left intact. Therefore, we cannot say that these provisions, were we to declare them unconstitutional, are of such a nature that they would render invalid the portion of the statute that does affect Eastern's rights. Eastern has no standing to raise this issue.

Eastern Air Lines, 455 So. 2d at 317. Similarly, in this case, even assuming the exemptions cited by appellant are unconstitutional, this does not render invalid the portion of the statute affecting Sharper Image.

As appellant argues, however "[t]he demarcation between the favored and non-favored classifications of taxpayers in *Eastern,* i.e., between agricultural and fishing interests on the one hand, and airlines on the other, was not itself an unconstitutional distinction," whereas in this case the line separating taxable and nontaxable publications has been drawn based on unconstitutional criteria, i.e., the contents of those publications. Because appel-

lant's constitutional claim thus involves a content-based approach to taxation of publications, it does appear, contrary to appellee's assertion, that appellant has standing. *See Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 227 (1987) (holding that publisher of general interest magazine had standing to challenge constitutionality of sales tax scheme, which exempted sales of newspapers and religious journals, even though it did not publish such newspapers or religious journals). *See also Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 7-8 (1989) (finding that publisher of nonreligious periodical had standing to challenge sales tax exemption provided by Texas statute for religious periodicals even if state law remedy for unconstitutional exemption would be to eliminate exemption rather than extend it to nonreligious periodicals); *Department of Rev. v. Magazine Publishers of Am., Inc.*, 604 So. 2d 459, 462-63 (Fla. 1992) (Finding the imposition of a tax on the sales of magazines while exempting the sales of newspapers constituted an invalid tax scheme under First Amendment, the court explained that "the content of a publication is a key factor in determining whether the publication is subject to taxation" and the state had failed to show a compelling justification for the content-based taxation of publications.).

Regarding the merits of the second point on appeal, appellant argues that *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), and *Department of Revenue v. Kuhnlein*, 646 So. 2d 717 (Fla. 1994), require the abatement of the use taxes assessed against Sharper Image because, under the Due Process Clause, the state must provide "meaningful backward-looking relief" when a taxing scheme is invalidated as discriminatory. Sharper Image correctly informs us that the Florida Supreme Court has declared the newspaper exemption in section 212.08(7)(w), Florida Statutes (Supp. 1988), unconstitutional. *See Department of Revenue v. Magazine Publishers of Am., Inc.*, 604 So. 2d 459 (Fla. 1992). In addition, in *Texas Monthly, Inc. v.*

Bullock, the United States Supreme Court held that a sales tax exemption for religious publications violated the First Amendment as made applicable to the states by the Fourteenth Amendment. 489 U.S. 1 (1989). The dissenting justices noted that, with the majority's decision, "the Court topples an exemption for religious publications of a sort that expressly appears in the laws of at least 15 of the 45 States that have sales and use taxes," including Florida. *Id.* at 30-31 n.2. Nevertheless, Florida's exemption for religious publications has not yet specifically been declared unconstitutional and, given that the Florida Supreme Court has already found the newspaper exemption unconstitutional, we do not find it necessary to engage in further analysis on this record regarding the possible unconstitutionality of the religious publication exemption. Indeed, Sharper Image does not suggest that its requested remedy would take a different form depending on which exemption is involved.

III. Remedy

A. Predeprivation Procedure

In *McKesson*, the United States Supreme Court explained that "[i]f a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a *postpayment* refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." 496 U.S. at 31 (footnote omitted; emphasis added). Nevertheless, in a footnote, the Court indicated that a *predeprivation* hearing would also satisfy due process concerns:

> We have long held that, when a tax is paid in order to avoid financial sanctions or a seizure of real or personal property, the tax is paid under "duress" in the sense that the State has not provided a fair and

> meaningful predeprivation procedure. In contrast, if a State chooses not to secure payments under duress and instead offers a meaningful opportunity for taxpayers to withhold contested tax assessments and to challenge their validity in a predeprivation hearing, payments tendered may be deemed "voluntary." *The availability of a predeprivation hearing constitutes a procedural safeguard against unlawful deprivations sufficient by itself to satisfy the Due Process Clause,* and taxpayers cannot complain if they fail to avail themselves of this procedure.

Id. at 39 n. 21 (citations omitted; emphasis added).

This court recently determined that the procedure, pursuant to section 72.011, whereby a taxpayer can contest a tax without penalty, by filing suit and paying the amount of the contested tax into the court registry, constituted a meaningful predeprivation remedy, consistent with due process, and made it unnecessary to provide meaningful backward-looking relief. *Newsweek, Inc. v. Department of Rev.*, 689 So. 2d 361 (Fla. 1st DCA 1997). In *Newsweek*, the taxpayer, relying on *McKesson*, sought a refund of taxes paid on the retail sale of magazines during the period, prior to the decision in *Magazine Publishers*, when newspaper were exempt. The court found *McKesson* inapplicable:

> [T]he coercive penalties which deprived the taxpayers in *McKesson* of any effective predeprivation remedy are not factors in this case. The taxpayers in *McKesson* were subject to onerous penalties if they did not pay the disputed tax before seeking a refund in a proceeding contesting the constitutionality of the tax. They had no predeprivation remedy because section 72.011 was not available to contest the liquor taxes at issue in that case; for that reason, *McKesson* is inapplicable.

Newsweek, 689 So. 2d at 364.

In this case, Sharper Image has availed itself of the predeprivation procedure under section 72.011. Therefore, the due process concerns in *McKesson*, which formed the basis of the Supreme Court's "meaningful backward-looking remedy" decree, are not present here. Indeed, appellant has cited us no cases suggesting that a *McKesson*-type remedy is available in circumstances such as this, where an adequate predeprivation procedure is available. Sharper Image essentially argues that an adequate predeprivation remedy must always be tantamount to a meaningful backward-looking remedy. These cannot be the same, however, because otherwise the *McKesson* decision would not have discussed the availability of adequate predeprivation procedures.

B. State Law Treatment of Unconstitutional Exemption

Federal constitutional requirements notwithstanding, the general rule for remedying an unconstitutional exemption looks to state law. *See Texas Monthly*, 489 U.S. at 8 ("It is not for us to decide whether the correct response as a matter of state law to a finding that a state tax exemption is unconstitutional is to eliminate the exemption, to curtail it, to broaden it, or to invalidate the tax altogether."); *see also American Trucking Ass'ns v. Smith*, 496 U.S. 167, 176 (1990) ("When we have held state taxes unconstitutional in the past it has been our practice to abstain from deciding the remedial effects of such a holding. While the relief provided by the State must be in accord with federal constitutional requirements, we have entrusted state courts with the initial duty of determining appropriate relief." (citation to *McKesson* omitted)). The Florida tax statutes specifically indicate that even when an exemption is declared unconstitutional, such declaration shall not affect the taxes imposed:

> (2) It is hereby declared to be the specific legislative intent to tax each and every . . . use . . . set forth in this chapter . . . [and] should any exemption

> or attempted exemption from the tax . . . be invalid, ineffective, inapplicable, unconstitutional, or void for any reason, such declaration shall not affect the tax or taxes imposed herein, but such . . . use . . . exempted or attempted to be exempted from the tax . . . shall be subject to the tax . . . to the same extent as if such exemption or attempted exemption had never been included herein.
>
> (3) It is further declared to be the specific legislative intent to exempt from the tax . . . only such . . . uses . . . to the extent that such exemptions are in accordance with the provisions of the constitutions of the state and of the United States.

§ 212.21, Fla. Stat. In *Magazine Publishers,* after finding the newspaper exemption unconstitutional, the Florida Supreme Court turned to Florida law to determine the proper remedy and focused on section 212.21. 604 So. 2d at 463-64. According to the Florida Supreme Court, the statute "makes it clear that as between the imposition of the tax or the granting of an exemption, the tax shall prevail." *Magazine Publishers,* 604 So. 2d at 463; *see also Thayer v. South Carolina Tax Comm'n,* 413 S.E.2d 810, 815 (S.C. 1992) (holding that although exemption from use tax granted to religious publications violated First Amendment, exemption was severable from statute and thus taxpayer was still responsible for use tax on real estate advertising publication). Similarly, in this case, Florida law determines the proper remedy for the "unconstitutional taxing scheme" challenged by appellant, and that law indicates that the unconstitutional exemption, or exemptions, should be eliminated, not the assessed tax.

C. Dissimilarity to Refund Cases

We further find that Sharper Image's analogy to the taxation schemes in *McKesson* and *Kuhnlein* is imperfect. In *Kuhnlein,* the supreme court found the Florida impact

fee imposed on vehicles brought to this state after purchase elsewhere facially unconstitutional. 646 So. 2d at 725. For such a violation the "only clear and certain remedy is a full refund to all who have paid this illegal tax." *Id.* at 726. In this case, however, appellant challenges the exemptions, and not the tax itself. Nothing in *Kuhnlein* mandates a full refund remedy for a taxpayer such as Sharper Image.

The taxpayer in *McKesson* had to pay a tax on alcoholic beverages that, by virtue of favored treatment of certain Florida products, offended the Commerce Clause. This conclusion derives from the Florida Supreme Court's treatment of McKesson's claim: "[T]he tax scheme at issue places a clear discriminatory burden on interstate commerce. . . ." *Division of Alcoholic Beverages & Tobacco v. McKesson Corp.*, 524 So. 2d 1000, 1005 (Fla. 1988). McKesson found itself at a competitive disadvantage, because "[i]t [was] undisputed that manufacturers and distributors of beverages which qualify for preferential treatment under this scheme are in direct competition with manufacturers and distributors of alcoholic beverages which do not." *Id.* at 1008. Such an observation simply cannot be made about the circumstances of Sharper Image versus the sellers of newspapers or religious publications. Although Sharper Image must pay the use tax, it can show no such disadvantage. Nothing in the record before us leads us to indulge a presumption that newspapers and religious publications have gained a competitive advantage over Sharper Image's catalog by virtue of the challenged exemptions.

IV. Conclusion

We hold that Sharper Image is subject to the use tax assessment because it distributed catalogs in this state. A *McKesson* remedy is out of place here because Sharper Image had an adequate predeprivation procedure in section 72.011, which it has pursued, and the tax involved

in this case is a legal tax that did not competitively disadvantage the taxpayer. Though Sharper Image has standing to challenge the "taxing scheme" as unconstitutional, it is not entitled to the relief it seeks.[8]

AFFIRMED.

ERVIN and BENTON, JJ. concur

---

[8] It cannot be said that Sharper Image has no real remedy despite its standing to challenge the "taxing scheme." The available remedy, striking the illegal exemption, should lead to a broader tax base and presumably more equitable rates. As this opinion notes above, the United States Supreme Court in *Texas Monthly* contemplated elimination of an exemption in response to a finding that such exemption is unconstitutional. 489 U.S. at 8.

APPENDIX C

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

Case No. 94-1849

SHARPER IMAGE CORPORATION,
a foreign corporation,
Plaintiff,

v.

THE DEPARTMENT OF REVENUE OF THE
STATE OF FLORIDA, a State Agency,
Defendant.

FINAL ORDER ENTERING SUMMARY JUDGMENT

THIS CAUSE came before the Court on the parties' cross-motions for summary judgment. The Court entered an order dated August 27, 1996, which granted the motion for summary judgment filed by Defendant, the Department of Revenue of the State of Florida; and denied the motion for summary judgment filed by Plaintiff, Sharper Image Corporation. For the reasons expressed in that August 27, 1996 order, which is incorporated herein by reference, it is hereby

ORDERED and ADJUDGED that final summary judgment is hereby entered in favor of the Defendant, the Department of Revenue of the State of Florida. The Plaintiff shall take nothing by this suit and shall go hence without day.

DONE and ORDERED in Chambers, at Tallahassee, Leon County, Florida, this 5th day of November, 1996.

/s/ William Dorsey
Circuit Judge

APPENDIX D

DISTRICT COURT OF APPEAL
FIRST DISTRICT

Tallahassee, Florida 32399
Telephone No. (904) 488-6151

February 16, 1998

Case No: 96-03734

L.T. Case No. 94-1849

SHARPER IMAGE CORPORATION
Appellant,

v.

DEPARTMENT OF REVENUE
OF THE STATE OF FLORIDA
Appellee.

BY ORDER OF THE COURT:

Appellant's motion for certification, filed January 20, 1998, is DENIED.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

By: /s/ Jon S. Wheeler
JON S. WHEELER
Clerk

By: /s/ Rhonda Casseaux
Deputy Clerk

APPENDIX E

CHAPTER 72

TAX MATTERS

Fla. Stat. ch. 72.011 (Supp. 1994)

[1]72.011 Jurisdiction of circuit courts in specific tax matters; adminstrative hearings and appeals; time for commencing action; parties; deposits.—

(1)(a) A taxpayer may contest the legality of any assessment or denial of refund of tax, fee, surcharge, permit, interest, or penalty provided for under s. 125.0104, s. 125.0108, chapter 198, chapter 199, chapter 201, chapter 203, chapter 206, chapter 207, chapter 210, chapter 211, chapter 212, chapter 213, chapter 220, chapter 221, s. 336.021, s. 336.025, s. 336.026, s. 370.07(3), chapter 376, s. 403.717, s. 403.718, s. 403.7185, s. 403.7195, s. 403.7197, s. 538.09, s. 538.25, chapter 550, chapter 561, chapter 562, chapter 563, chapter 564, chapter 565, chapter 624, or s. 681.117 by filing an action in circuit court; or, alternatively, the taxpayer may file a petition under the applicable provisions of chapter 120. However, once an action has been initiated under s. 120.56, s. 120.565, s. 120.57, or s. 120.575, no action relating to the same subject matter may be filed by the taxpayer in circuit court, and judicial review shall be exclusively limited to appellate review pursuant to s. 120.68; and once an action has been initiated in circuit court, no action may be brought under chapter 120.

(b) A taxpayer may not file an action under paragraph (a) to contest an assessment or a denial of refund of any

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[1] Note.—Section 39, ch. 92-320, provides that:

"(1) The Department of Revenue may adopt emergency rules under section 213.06(2), Florida Statutes, to implement and administer the provisions of this act.

"(2) This section shall take effect upon this act becoming a law."

tax, fee, surcharge, permit, interest, or penalty relating to the statutes listed in paragraph (a) until the taxpayer complies with the applicable registration requirements contained in those statutes which apply to the tax for which the action is filed.

(2) No action may be brought to contest an assessment of any tax, interest, or penalty assessed under a section or chapter specified in subsection (1) after 60 days from the date the assessment becomes final. No action may be brought to contest a denial of refund of any tax, interest, or penalty paid under a section or chapter specified in subsection (1) after 60 days from the date the denial becomes final. The Department of Revenue or, with respect to assessments or refund denials under chapter 207, the Department of Highway Safety and Motor Vehicles or, with respect to assessments or refund denials under chapters 210, 550, 561, 562, 563, 564, and 565, the Department of Business and Professional Regulation, shall establish by rule when an assessment or refund denial becomes final for purposes of this section and a procedure by which a taxpayer shall be notified of the assessment or refund denial. It is not necessary for the applicable department to file or docket any assessment or refund denial with the agency clerk in order for such assessment or refund denial to become final for purposes of an action initiated pursuant to this chapter or chapter 120.

[2](3) In any action filed in circuit court contesting the legality of any tax, interest, or penalty assessed under a section or chapter specified in subsection (1), the plaintiff must:

(a) Pay to the applicable department the amount of the tax, penalty, and accrued interest assessed by such

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[2] Note.—Section 29(2), ch. 94-353, provides that "[i]t is the intent of the Legislature that the amendment to subsection (3) of section 72.011, Florida Statutes, as set forth in this section, be applied in all pending and future actions."

department which is not being contested by the taxpayer; and either

(b)1. Tender into the registry of the court with the complaint the amount of the contested assessment complained of, including penalties and accrued interest, unless this requirement is waived in writing by the executive director of the applicable department; or

2. File with the complaint a cash bond or a surety bond for the amount of the contested assessment endorsed by a surety company authorized to do business in this state, or by any other security arrangement as may be approved by the court, and conditioned upon payment in full of the judgment, including the taxes, costs, penalties, and interest, unless this requirement is waived in writing by the executive director of the applicable department.

Failure to pay the uncontested amount as required in paragraph (a) shall result in the dismissal of the action and imposition of an additional penalty in the amount of 25 percent of the tax assessed. Provided, however, that if, at any point in the action, it is determined or discovered that a plaintiff, due to a good faith de minimis error, failed to comply with any of the requirements of paragraph (a) or paragraph (b), the plaintiff shall be given a reasonable time within which to comply before the action is dismissed. For purposes of this subsection, there shall be a rebuttable presumption that if the error involves an amount equal to or less than 5 percent of the total assessment the error is de minimis and that if the error is more than 5 percent of the total assessment the error is not de minimis.

(4)(a) Except as provided in paragraph (b) of this subsection, an action initiated in circuit court pursuant to subsection (1) shall be filed in the Second Judicial Circuit Court in and for Leon County or in the circuit court in the county where the taxpayer resides or maintains its principal commercial domicile in this state.

(b) Venue in an action initiated in circuit court pursuant to subsection (1) by a taxpayer that is not a resident of this state or that does not maintain a commercial domicile in this state shall be in Leon County. Venue in an action contesting the legality of an assessment or refund denial arising under chapter 198 shall be in the circuit court having jurisdiction over the administration of the estate.

(5) The requirements of this section are jurisdictional.

(6) Any action brought under this chapter is not subject to the provisions of chapter 45 as amended by chapter 87-249, Laws of Florida, relating to offers of settlement.